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## NEW ROYAL DECREE ON FOREIGN INVESTMENTS.

The Spanish Government has approved **Royal Decree 571/2023, of July 4**, on Foreign Investments (BOE No. 159, of July 5, 2023), which repeals the previous regime contained in Royal Decree 664/1999 and at the same time becomes an implementing regulation of Law 19/2003, of July 4, 2003, on the Legal Regime of Capital Movements and Foreign Economic Transactions (the "Law 19/2003").

This new RD on Foreign Investments will enter into force on September 1, 2023, so that until then Royal Decree 664/1999 and the second transitory provision of Royal Decree-Law 11/2020 will continue to be applicable, including investment authorization procedures initiated prior to September 1, 2023, to which these regulations - and, in particular, their decision deadlines- will continue to be applicable.

The new Foreign Investment Royal Decree regulates, among other things

- (i) the obligations to declare foreign investments in Spain for statistical purposes, which must be carried out in any case after the transactions that are the object of the declaration have been consummated;
- (ii) the obligations to declare Spanish investments abroad for these same purposes; and
- (iii) The most significant aspect is the amendment to and development of the mechanisms for the control of foreign direct investments (hereinafter referred to as "Control Mechanisms") by virtue of which the conclusion of certain investment transactions is subject to prior administrative authorization, both in general and in relation to (1) activities directly related to national defense (a matter formerly provided for in Art. 11 of Royal Decree 664/1999, now repealed); (2) acquisitions of real estate for diplomatic purposes from non-EU Member States; and, finally, (3) a new regime for investments in activities directly related to arms, cartridges, pyrotechnic articles and explosives for civilian use or other material for use by the State Security Forces and Corps.

It should be noted that the Control Mechanisms do not represent a prohibition of making foreign investment in Spain, but rather these are mandatory procedural requirements that must be complied with prior to the implementation (but not the signing) of certain foreign investment transactions in Spain. In particular, the most noteworthy from a practical point of view due to its frequency, the Control Mechanism provided for in Article 7 bis of the Royal Decree receives in Spain the legal framework applicable to the control of foreign investments in the European Union; in particular, Regulation (EU) 2019/452, which governs the possibility for



Member States to impose controls on foreign direct investments in the EU.

### **MOST SIGNIFICANT DEVELOPMENTS**

The main novelties that the RD of Foreign Investments has introduced in the Control Mechanisms are the following.

- (A) **Regarding the deadline for deciding on applications.** The period available to the authorities to decide (to authorize or not) on applications for authorization is reduced from six to three months. Silence after this period will be regarded as a refusal. Any official request for additional information may suspend the above-mentioned deadlines.
- (B) **A voluntary consultation procedure is established.** This procedure, although not expressly provided for in the previous regulations, had been existing in practice. Through this (voluntary) procedure, investors may receive, within a maximum period of thirty working days, a confidential and binding response as to whether or not a certain transaction should be submitted for authorization. The interested party may submit a request for authorization if no response is received after this period has elapsed, or in case the consultation is resolved in the sense that authorization is necessary.
- (C) **Elimination of the previous simplified procedure of 30 working days.** The possibility of resorting to the simplified procedure of the Control Mechanisms of Article 7 bis is eliminated for operations amounting to less than 5 million euros. The term to decide is also three months, although the competent body to resolve will vary depending upon the amount of the relevant transaction: these bodies are the Directorate General for International Trade and Investments in relation to operations whose amount is equal to or less than 5 million euros; and the Council of Ministers in any other case.
- (D) **Common regime applicable to all authorizations.** This common regime consists of the following: (i) the non authorized investor will not be able to exercise the economic and political rights in the Spanish target company until the required authorization is received; (ii) the previous practice that authorizations may be subject to conditions is ratified by the new rules; (iii) transactions carried out between the same parties within a two-year period are unified at the date of the last authorization received, although it seems logical to understand that if the company in which the investor participates is not the same, it cannot be considered that there is unity of transaction for control purposes; and (iv) it is clarified that only one application per investment (and not per investor) must be filed (provided that there is an agreement between the parties), so that the same investment in which several parties participate must be processed jointly;
- (E) **Transactions not subject to these rules.** Internal restructurings within a group of companies and increases in shareholdings by investors who already hold at least 10% in the Spanish company are not subject to the 7 bis Control

Mechanism, provided such increases do not result in changes in the control of the company.

- (F) **Private Collective Investments.** In the case of investments made through collective investment institutions or closed-end collective investment entities, pension funds, employment funds or other retirement investment entities, as well as similar legal structures, the subject obliged to submit the relevant control applications as owner of the investment will be the company management entity, provided the partners or beneficiaries do not legally exercise political rights or have privileged access to the company's information. This is a typical subject of complex investments made through institutions that are not always transparent.
- (G) **Differentiation by type of investor.** Alternatives are introduced to determine whether a foreign investor is subject to the Control Mechanisms of Article 7 bis regardless of the objective scope of its investment. Thus, in order to verify whether an investor is controlled by the government of a third country, the concept of control established in Article 7.2 of the Antitrust Law will be applied, and the authorities will be entitled to investigate whether such control is exercised through significant financing, including subsidies. On the other hand, the greater or lesser degree of risk will be assessed taking into account whether or not the investor has been sanctioned during the three (3) years prior to the investment under review.
- (H) **Exemptions.** The new rules display a new structure of exemptions with respect to the Control Mechanism of Article 7 bis. Under the previous regime, investments of less than one million euros were exempt from control. This minimum disappears, and the exemptions are hereafter applied according to the sector in which the investee company operates. Thus, for example, in the energy sector, investments that meet the following requirements are exempt: (i) that the company does not carry out "regulated activities", as defined in the RD of Foreign Investments, (ii) that the investment does not result in the company becoming a dominant operator in the market, (iii) in case of purchase of assets linked to energy production, the investment will be exempt when the share of installed power per resulting technology in the hands of the investor is less than 5%, for which a complex and generic formula is established, stating that the assets acquired "*shall be weighted by virtue of the degree of maturity and execution of the associated investment projects, taking into account their administrative processing status*", which raises doubts as to the applicable coefficients and other aspects whose assessment would exceed the limits of this brief report; and (iv) finally, in the case of electricity marketing companies, that their number of customers is less than 20,000. In parallel, acquisitions of real estate that are not attached to any critical infrastructure or that are not indispensable (and not substitutable) for the provision of essential services are also exempt. In the other sectors referred to in art. 7 bis.2 of Law 19/2003, investments in companies with a turnover of less than €5,000,000 are exempt, with various and numerous exceptions that reduce the impact of this exemption to a few types of companies.

- (I) **Novelties in the Defense Control Mechanism.** The RD of Foreign Investments establishes important novelties regarding the Defense Control Mechanism whose in-depth analysis would exceed the limits of this report but which we will be pleased to assess in case of interest.
- (J) **Notarial Obligations.** A new obligation is introduced for notaries "*who become aware that a foreign investment transaction is subject to prior authorization*" to "*advise applicants of the need to obtain such authorization*".
- (K) **Transfer of domicile abroad and change in the qualification of the investment.** The RD of Foreign Investments establishes that the change of registered office of legal entities or the transfer of residence of individuals "*will determine the change in the classification of an investment as Spanish investments abroad or foreign investments in Spain*". To which effects,
- (i) Foreign investors are defined as both "**Non-European Investors**" and "**Non-Spanish European Investors**" (*the latter, temporarily, until December 31, 2024*),
  - (ii) "**Non-European Investors**" are: (1) residents outside the EU and EFTA; and (2) residents of the EU or EFTA whose beneficial ownership is held by residents outside the EU and EFTA. This is understood to be the case when non-EU and EFTA residents ultimately own or control, directly or indirectly, more than 25% of the capital or voting rights of the investor, or otherwise exercise control, directly or indirectly, over the investor.
  - (iii) "**Non-Spanish European Investors**" are: (1) residents of EU and EFTA countries other than Spain; and (2) residents of Spain whose beneficial ownership corresponds to residents of EU and EFTA countries other than Spain. This is understood to be the case when EU and EFTA residents outside Spain ultimately own or control, directly or indirectly, more than 25% of the capital or voting rights of the investor, or when by other means they exercise control, directly or indirectly, over the investor.
  - (iv) "**Direct Foreign Investments**" are: (1) investments whereby the foreign investor acquires a holding equal to or greater than 10% of the capital stock of a Spanish company; (2) corporate transactions, acts or legal transactions whereby the foreign investor acquires control of a Spanish company or of all or part of it in accordance with the criteria established in Article 7.2 of the Antitrust Law; (3) likewise, and only when the investor is a Non-Spanish European and until December 2024, transactions involving a company listed in Spain.2 of the Antitrust Law; and (4) also, and only when the investor is a **non-Spanish European** and until December 31, 2024, transactions involving a listed company in Spain, or if it is carried out on a non listed company, those whose value exceeds 500 million euros.
- L) **Scope of application of the Control Mechanism.** Not all foreign direct investments are subject to the Control Mechanism of Article 7 bis, but this depends on (i) the sector in which the investee company carries out its business and (ii) the subjective characteristics of the foreign investor

when it is a *Non-European Investor*, regardless of the business sector of the investee company. Due to their purpose, various investments in critical infrastructures, whether physical or virtual, are also subject to the Control Mechanism of Article 7 bis, including - now expressly - energy, transportation, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities, as well as land and real estate that are key for the use of such infrastructures, understanding as such those contemplated in Law 8/2011. Likewise, investments affecting critical and dual-use technologies (*including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies*) are also included. Or those considered key to industrial leadership and enablement, including advanced materials and nanotechnology, photonics, microelectronics and nanoelectronics, life science technologies, advanced manufacturing systems and transformation, artificial intelligence, digital security and connectivity.

Special mention should be made of investments in technologies developed under programs and projects of particular interest to Spain, which include those involving (1) a substantial amount or percentage of financing from the budget of the European Union or Spain. (2) the supply of fundamental inputs, in particular those made by companies that develop and/or modify software used in the operation of critical infrastructures in the energy, water, telecommunications, financial and insurance, health, and food safety and logistics sectors; or which are indispensable and cannot be substituted to guarantee the integrity, safety or continuity of activities affecting the aforementioned sectors.

In consideration of the nature of the investor, foreign direct investments of the following Non-European Investors are also subject to the Control Mechanism of Article 7 bis, regardless of the sector in which it invests: (1) When the foreign investor is directly or indirectly controlled by the governments or public bodies or entities of third countries; or has made investments or developed activities in sectors that affect security, public order and public health in another Member State, and especially in the sectors subject to the Control Mechanism indicated above; or (2) If there is a serious risk that the foreign investor carries out criminal or illegal activities that affect public safety, public order or public health in Spain.

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